United States Court of Appeals

for the Second Circuit

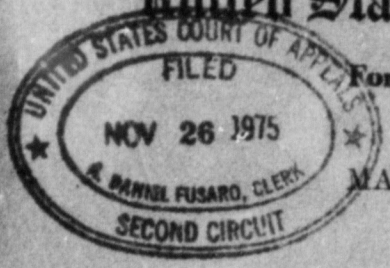
APPELLEE'S BRIEF

75-7423

ORIGINAL

To be argued by
F. V. Mina

United States Court of Appeals



For the Second Circuit.

MARY ANNE GUITAR,

Plaintiff-Appellant,

against

WESTINGHOUSE ELECTRIC CORPORATION, WESTINGHOUSE BROADCASTING CO., INC. (DEL.), H. PAUL JEFFERS, ROBERT MARTIN CORPORATION, ROBERT WEINBERG, MARTIN BERGER, JOHN YOTTES, MARGARET MIGLIORE SCHNEIDER and GERALD DAVID LLOYD,

Defendants-Appellees.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

Brief of Defendants-Appellees, Margaret Migliore Schneider and Gerald David Lloyd.

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Facts.

The plaintiff alleges to be a free-lance writer and the author of a book (A-8).* Appellant's brief (p. 11) as well as the exhibits on the Appendix and her own deposition confirm that she is an elected public official, a public speaker, an activist in civic affairs and an editor and writer for public consumption (A-193-A-213, A-240-A-242).

Gerald David Lloyd is the vice-president of Robert Martin Corporation (A-34) which is a real estate de-

*Figures in parentheses refer to page numbers in Appendix.

veloper (A-29) engaged in developing an area called Tarrygreen in the town of Greenburgh, New York (A-31).

Margaret Migliore Schneider is an employee of Robert Martin Corporation and the personal secretary to Martin Berger, its chief executive officer (A-31, A-34).

In November or December of 1972, the president of Robert Martin Corporation engaged John Yottes as a public relations consultant (A-33, A-34). Robert Martin's president did not know and had never been informed on or before December 17, 1972, that Yottes ever worked for Radio Station WINS (A-50). Gerald David Lloyd was only casually acquainted with Yottes because of his involvement in community affairs in the town of Greenburgh, Westchester County (A-169).

Gerald David Lloyd read the plaintiff's book "Property Power" (A-170) and did debate the plaintiff in Mahopac, Putnam County, when asked to do so as a representative of the Builder's Institute of Westchester County (A-169). Gerald David Lloyd was present at a meeting held by the "Committee to save Irvington" on September 13, 1972 (A-34, A-37), and did take notes of the comments of several speakers.

Gerald David Lloyd was present at a brunch meeting at Holiday Inn in Elmsford sponsored by Robert Martin Corporation. His presence there was merely to deliver and administer audio visual equipment (A-170).

Margaret Migliore Schneider did attend a meeting on December 13, 1972, in Irvington and did transcribe the notes taken at that meeting by Gerald David Lloyd (A-34, A-37). Mrs. Schneider has never read the plaintiff's book "Property Power" (A-168).

Neither Gerald David Lloyd nor Margaret Migliore Schneider knew H. Paul Jeffers prior to the commencement of this lawsuit (A-167, A-169), nor had they ever met him.

Either at the brunch meeting or sometime soon thereafter Yottes made mention to Berger of a broadcast of a book review on December 17, 1972, over WINS (A-46-A-47). Berger decided it would be advantageous to reprint the broadcast. He received a copy of it from Yottes and had it reprinted by someone in his office (most probably Margaret Migliore Schneider) (A-48-A-49). Mr. Berger identified Plaintiff's Exhibit 4 for Identification as the reprinted document (A-51).

In addition to the book review on the printed document, Berger authored the balance of its contents (A-52). This consisted of:

> "Ms. Guitar quotes:"
>
> "'My role is to make you feel less guilty about wanting to preserve your wooded boundaries and keep all newcomers out at all costs.'"
>
> "'City people should be made to stay in the city.'"
>
> "'The City should not be robbed of its livelihood by enticing industry to the suburbs.'"
>
> "'I would be happy to throw sand in the wheels of progress.'"

The first quote was derived from the notes made of the plaintiff's public statements on December 13th at the Irvington meeting (A-52-A-53) in which she said:

> "I consider my role to be to do a little conscience raising to make you all feel less guilty. When

> you bought you bought more than a house you bought an environment and you are entitled to it. This tract is the last piece of green you have you must preserve it at all costs."
>
> "Don't feel guilty—don't let them make you feel guilty. You have equity in your environment. You have some rights—don't let an outsider take them away from you. Developers should be forced to live in this kind of mini-city to be punished for their wrong doing" (A-233).

For the quote "City people should be made to stay in the city" Berger's derivation was from those same notes (A-53-A-54):

> "We should keep the plants in the cities. Everybody would be better off. We can be the green belts for the denser area. Let's not move the city to the country" (A-235).
>
> "let's not move the city to the country" (A-239).

Berger relied on page 264, Paragraph 3, of "Property Power" authored by the plaintiff as the source of the quote "The City should not be robbed of its livelihood by enticing industry to the suburbs" (A-54-A-55). The plaintiff did not take issue with the substantive accuracy of the source of this quote (A-205, A-318).

The quote "I would be happy to throw sand in the wheels of progress" was derived from a publication of an article authored by the plaintiff in Mademoiselle Magazine, June issue (A-55-A-56), where it stated:

> "I have been a strong advocate of land preservation, been vocally opposed to 'mindless growth' and left little doubt that, if elected, I would be happy to throw sand in the wheels of 'progress'" (A-240).

In addition to the above printed document, Martin distributed an illustrative map of the Tarrygreen development plan. A brochure of the project and an article published in the Daily News were distributed at the December 26, 1972 Town of Greenburgh Planning Board public meeting (A-33, A-69-A-70), which Planning Board was to pass on or reject the Tarrygreen plan (A-66-A-67).

On the order of the court to plaintiff's insistence upon having the questions answered, Berger testified that from his reading of the book "Property Power" he would generally construe it as a hand-book to keep others out without being able to give specific quotations to demonstrate that impression since he had read the book sometime before (A-77-A-82).

The plaintiff does not dispute the fact that she was one of the public speakers at the Town of Irvington meeting on December 13, 1972, on the subject of the Tarrygreen development, where she spoke out against the plan (A-233-A-239).

H. Paul Jeffers' affidavit states that from June 1, 1969 until January 13, 1973, he was employed as a news editor for WINS (A-132) and that after he had read a related article in the New York Times he decided to and did tape a review of the book "Property Power," which he had previously read, to be broadcast as a timely item of interest. He stated he received only a $20 talent fee from WINS therefor. The review was entirely from the book and the cover sheet thereof and was his singular effort made without any consultation, advice, suggestion or even knowledge of any of the other parties involved in this litigation (A-133-A-134).

The affidavit of John Yottes states that prior to December 1, 1972, and after January, 1973, he was employed

by WINS as a casual employee but did no work for them from December 3, 1972 to February 2, 1973. Late in 1972 he was retained by Martin to do public relations work for it in reference to the Tarrygreen project. He said he knew Jeffers but he did not participate in any way with Jeffers in the subject book review. On the morning of December 17, 1972, he heard the book review of "Property Power" broadcast and knowing the author as the plaintiff herein who spoke on the above December 13th public meeting he ascertained that there would be a re-broadcast of the same review that day and he taped it for them and gave the transcript thereof to Martin. Yottes asserted that he had nothing else to do with this transcript and only saw it again on December 20th as incorporated as a purported reprint in the paper distributed by Martin at the Greenburgh Planning Board public meeting (A-182-A-184).

The District Court found that the variations claimed between the actual book review and the reprint thereof were not significant (A-320). They consisted of leaving out in the reprint the word "fresh" from "fresh country air," the word "seeming" from "What bothers me about Property Power is the seeming hypocrisy of it" and the words "I'm afraid it's" from the clause "Mary Anne Guitar's Property Power is a blueprint for exclusion * * * and, if followed, I'm afraid it's a blueprint for stagnation in the suburbs."

POINT I.

The publication is not libelous.

The District Court Judge, upon reading the plaintiff's book "Property Power," came to substantially the same conclusion as the defendant Jeffers did in his comments and opinions in his critique of the book (A-322).

Concerning the Ms. Guitar quotes, the plaintiff does not dispute the quote "The city should not be robbed of its livelihood by enticing industry to the suburbs" (A-205-A-318). Nor does the plaintiff deny that the words contained in the quote "I would be happy to throw sand in the wheels of progress" were the same words found in her article published in Mademoiselle (A-240). In the remaining quotes "City people should be made to stay in the city" and "My role is to make you feel less guilty about wanting to preserve your wooded boundaries and keep all newcomers out," the plaintiff denies ever having made these quotes in words or substance (A-202-A-203). However, the plaintiff has not submitted any affidavit giving evidence to refute these quotes. Further, the court, in its opinion (A-322), stated that, in a sense, the book does advocate "keeping others out." Moreover, there are the notes sworn to have been accurately made by the defendant, Lloyd, of the plaintiff's public comments at the December 13, 1972 meeting (A-233-A-238), which form the basis of the quotes in Martin's leaflet. As stated, the plaintiff has the duty to come forward with evidence to refute the truth of Lloyd's notes. *Kramer v. Harris*, 9 A. D. 2d 282, 283.

Therefore, it is apparent that the notes conform to the spirit, intent and the theme of the plaintiff's book, "Property Power."

In *Pauling v. National Review, Inc.*, 22 N. Y. 2d 818, it was held:

> "The statements which they made concerned one who, concededly, was and is a 'public figure.' (See *Curtis Pub. Co. v. Butts*, 388 U. S. 130, 162, 87 S. Ct. 1975 18 L. Ed. 2d 1094.) Accordingly, we need go no further than to say that we find, as did the courts below, that the plaintiff failed to estab-

> lish the fact, essential to the cause of action, that the defendants' published the statements in question either with 'knowledge of their falsity or with reckless disregard' of whether they were true or false (*New York Times Co. v. Sullivan*, 376 U. S. 254, 279-280, 84 S. Ct. 710, 11 L. Ed. 2d 686. See also, *Pickering v. Board of Educ.*, 391 U. S. 563, 573, 88 S. Ct. 1731, 20 L. Ed. 2d 811) or with a 'high degree of awareness' of their probable falsity (*Garrison v. State of Louisiana*, 379 U. S. 64, 74, 85 S. Ct. 209, 13 L. Ed. 2d 125) or that the defendants 'in fact' entertained 'serious doubts' as to their truth. (*St. Amant v. Thompson*, 390 U. S. 727, 731, 88 S. Ct. 1323, 20 L. Ed. 2d 262.)"

Since it has been construed that the book amounts to a format or a hand-book for "keeping others out" by both the District Court Judge and Jeffers, it would certainly seem that this is a reasonable meaning which a person may draw from reading this book.

> "It is for the court to decide whether a publication is capable of the meaning ascribed to it; 'The court shirks its duty if it creates an issue where none exists.' *Crane v. New York World Tel. Corp.*, 308 N. Y. 470, 479, 480." *Julian v. American Business Consultants*, 2 N. Y. 2d 1, 17; *Tracy v. Newsday, Inc.*, 5 N. Y. 2d 134, 136.

In *Foley v. Press Publishing Co.*, 226 App. Div. 535, 547, the court held that the reasonableness of construction cannot be measured by the meaning the author intended. Therefore, it is submitted that the leaflet circulated was not actionable at all but was, in fact, a reasonable comment on the content of the book.

POINT II.

Fair comment and constitutional privilege are an absolute defense.

The law as to libelous statements is qualified by the right of every citizen to "fair comment." *Julian v. American Business Consultants*, 2 N. Y. 2d 1, 155 N. Y. S. 2d 1. When an author submits her work to the public, she invites fair comment of which criticism may be an element. Criticism is a right the public enjoys as long as it does not include a personal attack against the author. *Buckley v. Vidal*, 327 F. Supp. 1051; *Berg v. Printers Ink Publishing Co., Inc.*, 54 F. Supp. 795; *Triggs v. Sun Printing and Publishing Assn.*, 179 N. Y.

The District Court, in its decision (A-313), stated that the plaintiff, by publishing her book "Property Power" and by speaking and debating at public forums, had to expect public attention and that the book review by defendant Jeffers and the republication with the Ms. Guitar quotes were fair comment and not a personal attack on the plaintiff as she alleged.

In *New York Times v. Sullivan*, 376 U. S. 254 (1964), the United States Supreme Court first enunciated the constitution privilege doctrine. A public official charging libel must prove that the article concerning him was published with actual malice. Malice is defined as knowledge that the article is false or with reckless disregard. This decision was later extended to "public figures" in *Curtis Publishing Co. v. Butts*, 388 U. S. 130. Later, in *Rosenbloom v. Metromedia, Inc.*, 403 U. S. 29, the court held that this privilege should be extended to private persons, if their publication concerned matters of general or public interest. The court limited its holding as to private individuals (*Gertz v. Robert Welch, Inc.*, 542

USLW 5123) where the substance of the defamatory statement of fact, as distinguished from opinion, "makes substantial danger to reputation apparent." This danger is obviously not present in the instant case.

The plaintiff spoke at a public meeting as an advocate for her point of view. As such, the plaintiff was a public figure as described in *Gertz* and later clarified in *Dacey v. Florida Bar, Inc.*, 427 F. 2d 1292 (5th Cir. 1970).

The plaintiff has not sustained her burden of proving malice on the part of the defendants and therefore the First Amendment of the Constitution would be a bar to her action.

POINT III.

Summary judgment was proper.

The plaintiff has the burden of proof as to the issue of whether or not malice was actually present. *United Medical Laboratories, Inc.*, 404 F. 2d 706, 712 (9th Cir. 1968), cert. denied 394 U. S. 921 (1969); *Thompson v. Evening Star Newspaper Co.*, 394 F. 2d 774, 776 (D. C. Cir. 1968).

The defendants have established prima facie that their publication was privileged under the First Amendment and therefore, the plaintiff must come forth and show malice on the part of the defendants. The plaintiff has not done this by any evidentiary means, but has merely made conclusory allegations, such as that the chain of events constituted "incredible coincidences" (p. 17 of plaintiff-appellant's brief). These allegations and numerous others are based upon suspicion, surmise and accu-

s[illegible]ion a[illegible] are not enough." *Trails West, Inc., v. Wolff*, 32 N. Y. 2d 207, 211 (1973).

Further, the record is devoid of any facts sufficient to raise the slightest issue as to any defamatory statements, or if there were such statements, that they were made knowledgeably or with reckless disregard.

The plaintiff has the burden of displaying facts as evidence to defeat the defendants' motion for summary judgment.

> "In examining the affidavit we remand ourselves that there is a positive requirement that it must show evidentiary facts (*O'Meara Co. v. National Park Bank of New York*, 239 N. Y. 386, 395) and that a motion for summary judgment may not be defeated by charges 'based upon surmise, conjecture and suspicion' (*Bank for Savings City of New York v. Rellim Const. Co.*, 285 [illegible]. Y. 708-709." *Shapiro v. Health Insurance Plan of Greater N. Y.*, 7 N. Y. 2d 56, 63.

Plaintiff has alleged a conspiracy amongst the defendants. However, upon a review of the testimony it is seen that the defendants, Yottes and Jeffers, disclaim any conduct evidencing a conspiracy (A-131-A-134, A-182-A-184) and all affidavits and depositions of the other defendants deny any conspiracy as alleged by the plaintiff.

Lastly, the plaintiff's mere assertion that she never made, in words or substance, any statements recorded by Lloyd of her December 13, 1972, public hearing at Irvington (A-204-A-205) is not adequate in defeating a motion for summary judgment. The plaintiff does not deny that she spoke on December 13, 1972, at Irvington and therefore in order for the plaintiff to overcome the testimony attesting to the substance of these statements, she must

submit probative evidence as to what she alleges the actual statements were.

> "It is not enough that a defendant deny a plaintiff's presentation in summary judgment. He must state his version, and he must do so in evidentiary form (*O'Meara Co. v. National Park Bank of New York*, 239 N. Y. 386, 395; *Dodwell & Co. Ltd. v. Silverman*, 234 App. Div. 362). This is what is lacking in this case." *Kramer v. Harris*, 9 A. D. 2d 282.

POINT IV.

There is no viable claim for statutory violation.

Appellant has no cause of action based upon a claim of violation of the Communications Act.

The appellees herein rely upon the court's opinion (A-333-A-342) for their position that appellant does not have any private right of action based on conspiracy to violate 47 U. S. C. §§ 317, 501, 502, 503 and 508 of the Federal Communications Act of 1934 as amended.

In addition, there is absolutely no evidence of a violation which could remotely bring these facts within the purview of the Act.

CONCLUSION.

The judgment on appeal should be affirmed.

Respectfully submitted,

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Attorneys for Defendants-Appellees,
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Gerald David Lloyd,
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(212) 233-4397.

VINCENT TESE,
Of Counsel.

United States Court of Appeals

376—Affidavit of Service by Mail For the Second Circuit The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

Mary Ann Guitar

Plaintiff-Appellant

against

Westinghouse Electric Corporation, Westinghouse Broadcasting Company Inc., H. Paul Jeffers , Robert Martin Corporation , Robert Weinberg Martin Berger et al.

Defendants-Appellees

State of New York, County of New York, ss.:

Raymond J. Braddick, agent for F.V.Mina, being duly sworn deposes and says that he is the attorney for the above named Defendant-Appellee herein. That he is over 21 years of age, is not a party to the action and resides at 8 Mill Lane Levittown, New York

That on the 26th. day of November, 19 75 he served the within

Brief

upon the attorneys for the parties and at the addresses as specified below

1. Townley, Updike, Carter & Rodgers
   200 EAST 42nd. STREET
   New York, New York
2. Cerchiara & Cerchiara Esqs.
   145 Mt. Vernon Avenue
   Mt. Vernon, New York
3. William F. Larkin Esq.
   11 Park Place
   New York, New York
4. Windels & Marx Esqs.
   51 West 51st. Street
   New York, New York

by depositing 2 true copies to each to each of the same securely enclosed in a post-paid wrapper in the Post Office regularly maintained by the United States Government at 90 Church Street, New York, New York directed to the said attorneys for the parties as listed above at the addresses aforementioned, that being the addresses within the state designated by them for that purpose, or the places where they then kept offices between which places there then was and now is a regular communication by mail.

Sworn to before me, this 26th. day of November, 19 75

Roland W. Johnson

ROLAND W. JOHNSON,
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1977

Raymond J. Braddick